(3)

Supreme Court, U.S.
FILED
FEB 21 2003
CLERK

No. 02-868

In the

Supreme Court of the United States

RONALD W. SKEDDLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MICHAEL S. SOMMER
Counsel of Record
ELLIOT SILVERMAN
MCDERMOTT, WILL & EMERY
50 Rockefeller Plaza
New York, New York 10020
(212) 547-5400

Counsel for Petitioner

7 pp

TABLE OF CONTENTS

Page

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Argument 1

CONCLUSION 4

TABLE OF AUTHORITIES

Page(s)

Cases:

Bronston v. United States, 409 U.S. 352 (1973) 2

United States v. Braunstein, 281 F.3d 982 (9th Cir. 2002) 1, 2

United States v. Gatewood, 173 F.3d 983 (6th Cir. 1999) 2

United States v. Gilbert, 198 F.3d 1293 (11th Cir. 1999) 1, 2

United States v. Pirro, 212 F.3d 86 (2d Cir. 2000) 2

Statutes:

18 U.S.C. §3006A, statutory note 1, 2, 3

26 U.S.C. §7206(1) 2

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Ronald W. Skeddle respectfully submits this Reply Brief in further support of his Petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Argument

The Government's Brief in Opposition misstates the holding of the Sixth Circuit and thereby seeks to obscure the ways in which that court's ruling conflicts with those of other circuits; ignores its own prior precedents, as well as those of this Court; and distorts the plain meaning of the Hyde Amendment (18 U.S.C. §3600A note).

The Hyde Amendment authorizes an award of attorneys' fees to a defendant in a criminal case if the prosecution's position "was frivolous, vexatious, or in bad faith." As is set forth more fully in the Petition, all other circuits to have construed this statute have held that a position is "frivolous" if it is *objectively* without arguable legal merit. *E.g., United States v. Braunstein*, 281 F.3d 982, 995 (9th Cir. 2002); *United States v. Gilbert*, 198 F.3d 1293, 1304 (11th Cir. 1999); Petition 11-13.

In this case, in contrast, the Sixth Circuit added an additional, *subjective* requirement, holding that Mr. Skeddle was not entitled to attorneys' fees, even though the Government attempted to prosecute him on a legal theory which was clearly foreclosed by binding precedent — as a fact of which defense counsel had informed the prosecution at the outset of the case — solely because the Government was not "up to something nefarious." (A35).

The Government now tries to argue that the Sixth Circuit really applied the correct construction of the term "frivolous" and merely used the "nefarious" language to explain why the

prosecution's theory did not fall under the statute's "vexatious" or "bad faith" prongs. (Opp. 7). But this argument ignores the crucial underlying point that the prosecution's theory was, indeed, objectively frivolous. (Petition 15-16).

A legal position is "frivolous" under the Hyde Amendment if it is "foreclosed by binding precedent." *Braunstein*, 281 F.3d at 995; *Gilbert*, 198 F.3d at 1304. The Government does not contend otherwise.

Here, the Government prosecuted Mr. Skeddle under 26 U.S.C. §7206(1), the tax perjury statute, for claiming on tax returns that his children were the owners of a corporation known as SWR. Mr. Skeddle's children were, however, the sole shareholders of SWR. (A22). Accordingly, the tax returns properly named the children as the corporation's owners. *United States v. Pirro*, 212 F.3d 86, 89-91 (2d Cir. 2000) (affirming dismissal of charge under 26 U.S.C. §7206(1)).

Before the trial, counsel for Mr. Skeddle alerted the Government to controlling precedent of this Court and of the Sixth Circuit holding that a charge of perjury or false statements will not lie where the defendant's statements are literally true, even if intended to mislead or conceal. (A22; *see also* Petition 5-7). *E.g., Bronston v. United States*, 409 U.S. 352 (1973); *United States v. Gatewood*, 173 F.3d 983, 988 (6th Cir. 1999).

The Government does not even attempt to argue that Mr. Skeddle's statements were not literally true, or that there was any arguable legal theory that could have supported prosecuting Mr. Skeddle under 26 U.S.C. §7206(1) for making such literally true statements. (*See* Opp. 7). Accordingly, it is indisputable that the prosecution of Mr. Skeddle was "frivolous" within the meaning of the Hyde Amendment.

In light of the indisputable frivolity of the government's position in prosecuting Mr. Skeddle under its "ownership" theory, Mr. Skeddle should have prevailed on his Hyde Amendment motion. He did not prevail because the Sixth Circuit found that while the government's position was foreclosed by binding precedents of both this Court and of the Sixth Circuit, there was nothing "nefarious" about the government's prosecution. The Sixth Circuit's position is, therefore, at odds with both the position of Circuit Courts and the plain language of the Hyde Amendment itself.

CONCLUSION

For the reasons stated above, and in the Petition, the Petition for Writ of Certiorari should be granted.

Dated: February 21, 2003

Respectfully submitted,

MICHAEL S. SOMMER
Counsel of Record
ELLIOT SILVERMAN
MCDERMOTT, WILL & EMERY
50 Rockefeller Plaza
New York, New York 10020
(212) 547-5400

Counsel for Petitioner